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Sharia and Beth Din courts in the UK: is legal pluralism nothing more than a necessary political fiction?

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In 2008, the then Archbishop of Canterbury, Rowan Williams, gave a speech in which he argued that to maintain support for legal authority in the UK, English law should allow for parallel systems of courts drawing from other sources of law, namely religious law. Dr Williams was speaking specifically of Muslim courts, Sharia courts, and he was postulating that it may be positive for the English law and for English justice in general, to facilitate for a more pluralist legal system in which people can choose which law they wish to comply with, religious or English¹. Dr Williams' speech received a great deal of criticism, mostly unjustified, and this paper is seeking to use Dr Williams' suggestions as a basis from which to critique whether a pluralist court system is possible, or in fact desirable, in the area of family law. By considering predominately Sharia Councils (courts) but also making some reference to the Jewish equivalent, the Beth Din, the theoretical workings of a parallel religious tribunal will be explored and it shall be demonstrated that in reality, such a parallel system is unable to formally function.

¹ R. Williams, *Civil and Religious Law in England: A Religious Perspective*, "Ecclesiastical Journal" 2008, vol. p. 3, <http://dx.doi.org/10.1017/S0956618X08001403>.

By considering evidence of the practical behaviour and functioning of Sharia courts, it is apparent that such Councils are wildly over-stepping their jurisdiction within family matters and are heavily straying into criminal issues such as domestic abuse. Moreover, with the coming criminalisation of forced marriages, this jurisdictional spill-over is certain to increase exponentially. It shall not be concluded that Sharia and Jewish courts should cease to function in other areas of English law as in many areas such as commercial law they function very well and play an important role in a rightly expanding multicultural Britain. However, what shall be proposed is a far more heavily regulated religious family tribunal which no longer undermines and threatens the criminal jurisdiction of English courts.

Cultural identity is rapidly shifting in the face of ever growing globalisation. Identity is moving away from a pre-occupation with the nation, and toward a more nuanced and multifaceted understanding of the individual, including religious and cultural considerations. In the face of distrust and growing racial/religious suspicion, a *new multiculturalism* has emerged, one in which individuals are increasingly anxious to assert their own cultures and increasingly, their own laws². A result of this is that the law in many countries is not being universally accepted as being the authority by which people resolve issues. Whilst ostensibly obeying the law of the land, minority groups are increasingly turning to unofficial or alternative methods of dispute resolution which is leading to the practical fragmentation of the law³. Subsequently, our foundation of legal positivism and belief that the law stems

² J. Brechen, *A study of the use of Sharia law in religious arbitration in the United Kingdom and the concerns that this raises for human rights*, "Ecclesiastical Law Journal" 2013, vol. 15, p. 1; <http://dx.doi.org/10.1017/S0956618X13000434>.

³ A. Buchler, *Islamic Family Law in Europe? From Dichotomies to Discourse: Or, Beyond Cultural or Religious Identity in Family Law*, "International Journal of Law in Context" 2012, vol. 8, p. 6, <http://dx.doi.org/10.1017/S1744552312000043>.

from the State is being undermined⁴. This is particularly true in the UK in the area of family law.

There are approximately 2,869,000 Muslims and just over 260,000 Jews in the UK, not to mention the many other people of faiths other than the Church of England. The United Kingdom prides itself on tolerance and the allowing of other faiths to co-exist alongside the state religion. This is not the forum to discuss the quality of British tolerance but it is perhaps illustrative to refer to the infamous quote of the then Prime Minister, Tony Blair when he said: "Our tolerance is part of what makes Britain, Britain. So conform to it; or don't come here... **The right to be different. The Duty to integrate.** (my emphasis) This is what being British means. And neither racists nor extremists should be allowed to destroy it"⁵.

This quote is significant as it demonstrates an on-going tension between the appearance of tolerance of other religions and the maintenance of values deemed to be British. Putting critical analysis of what is cultural tolerance aside, there has been a tradition within the UK, as far as possible, to allow people of other faiths to practise their religion and maintain their culture when in the UK. Historically this has been expressed by the English recognition of the marriages of people within the British Empire, even when they were conducted through local custom and not English law⁶. In the last two hundred years this "tolerance" has also been demonstrated by the English legal system allowing Jewish courts to function alongside the English courts in matters such as family law matters and the controlling of kosher foods⁷. More recently this approach has been extended to Muslims and Sharia Councils through the establishment of the Muslim Arbitration Tribunal in 2007.

⁴ Ibidem.

⁵ Quoted in A. Vakulenko, *Liberalism, civilisation and the (non)oxymoronic limits of tolerance*, "International Journal of Law in Context" 2007, vol. 11, p. 1, <http://dx.doi.org/10.1017/S1744552307004065>.

⁶ A. Buchler, *op.cit.*, p. 6.

⁷ B. Berkovits, *Beth Din arbitration and the Human Rights Act*, section 6, "Arbitration" 2005, vol. 71, p. 1.

It is far beyond the scope of this analysis to consider Sharia law in any detail, however, for contextual reasons it is important to recognise that Sharia law is in fact not one set of laws per se. Muslim law draws from two main sources of authority, the Quran and the Sunnah but, as all sources of law, there is some discussion about the interpretation of these texts⁸. It is sufficient for our purposes to acknowledge that Sharia law considers the majority of family law matters to be private and subject to religious law, not the law of the land within which a Muslim may be residing.

1. The rationale behind a pluralist system

It is wrong to assume that all Muslims in the UK wish to live under Sharia law and moreover, it is wrong to think of Muslims in the UK as being homogenous. But clearly a number of the nearly 3 million Muslims in Britain today wish to maintain their cultural heritage by conducting some law under Sharia authority⁹. Moreover, it has been well argued that: "obedience to law is not forthcoming simply because it is the command of a Sovereign. Law must serve some genuine or perceived needs of the people before it can gain legitimacy, otherwise it is just a command of some powerful entity: to be submitted to but not to be accepted as legitimate"¹⁰.

In light of the fact that Islamic politics and law does not recognise the distinction between religious and secular spheres of life, if the English court system wishes those Muslims wanting to live under Sharia to integrate into the English legal system, they have to accommodate for some cultural and legal practices which vary from the English. Undoubtedly the use of ADR in the UK has

⁸ A. Kamali, *The Influence of Sharia Norms on Dispute Settlement and International Law: the International Court of Justice, Room for Accommodation?*, Westlaw 2009, p. 4.

⁹ S. Bano, *Inpursuit of religious and legal diversity: a response to the Archbishop of Canterbury and the "Sharia debate" in Britain*, "Ecclesiastical Law Journal" 2008, vol. 10, p. 2.

¹⁰ A. Ishtiaq, *Western and Muslim perceptions of universal human rights*, "Afrika Focus" 1994, vol. 10, p. 31.

been popular as it empowers parties involved in the dispute and reduces the burden of courts¹¹. However, in our haste to move law into the private sphere we have risked privatising and thus, hiding, areas of law which ought to remain public¹², specifically domestic violence.

2. Sharia Councils and The Muslim Arbitration Tribunal

The Muslim Arbitration Tribunal(MAT) came into being following calls for regulation of Sharia Councils which had been in operation in the UK unofficially since the 1970s¹³. Prior to the Arbitration Act 1996 which provided the legal foundation upon which many Sharia Councils began to operate formally, these councils would be involved in marital disputes from divorce to child care. However, these decisions had no impact on English legal judgments. The establishment of formal Sharia Councils allowed people to choose any third party to act as arbitrator on their behalf¹⁴ and these decisions would carry some weight within the English court system.

These councils were further formalised by the Muslim Arbitration Tribunal. Established in 2007, the MAT is supposed to operate within a civil jurisdiction, focusing mainly on divorces and commercial disputes and the decisions of which are treated as any other alternate dispute resolution tribunal. This means that parties can consent to have their disputes decided by a third party and that these decisions are recognised in an English court. This is not to say that such decisions cannot be appealed in an English court but English courts will generally have respect for the fact that the parties have agreed to a particular party deciding an issue and are reluctant to change these decisions on the grounds that one

¹¹ J.Brechen, op.cit., p. 3.

¹² S. Bano, op.cit., p. 6.

¹³ M. Enright, *Preferring the stranger? Towards an Irish approach to Muslim divorce practice*, "Irish Jurist" 2013, vol. 49, p. 2.

¹⁴ Z. Akhar, *Conflict of laws, Sharia and dispute resolution*, "International Arbitration Law Review" 2011, p. 1.

party is unhappy with the outcome. The MAT rules of procedure state that the tribunal's role is to provide "a viable alternative for the Muslim community seeking to resolve disputes in accordance with Islamic Sacred Law and without having to resort to costly and time consuming litigation"¹⁵.

Sharia courts essentially play three functions: to mediate and provide advice on family matters, to issue divorces to women (Muslim men do not need permission to get a divorce as they can unilaterally divorce their wives), and to provide expert opinion to English courts on matters of Sharia law¹⁶.

The MAT is more regulated than local Sharia Councils which often sit in people's houses and in mosques. An MAT tribunal will be made up of at least one Sharia law scholar and one lawyer qualified in English law and whilst the decisions are to be made with close consideration of Muslim law, the English lawyer is supposed to ensure that no English laws are undermined. It is significant to note that the MAT does purport to address issues of domestic violence and forced marriage but only the civil remit of these areas¹⁷.

3. Sharia and the criminal law

It is the area of family law which upsets the hopes for a pluralist legal system. It is here that we most clearly find the overlap between family and criminal law. Domestic abuse has, until fairly recently, often been seen as a matter of private rather than public law within the English system and this delineation between public and private family matters has been maintained by Muslim law to a large extent. However it should be noted that extreme violence is deemed inappropriate for arbitration within Muslim law¹⁸.

English law recognises that there are public and private dimensions to family law but it is within this area of law that we see the

¹⁵ Ibidem.

¹⁶ S. Bano, *op.cit.*, p. 7.

¹⁷ Z. Akhar, *op.cit.*, p. 1.

¹⁸ A. Kamali, *op.cit.*, p. 1.

most tension between religion, culture and tradition¹⁹. For example in English law, there is a clear distinction between private child law, when the parents dispute child care or contact, and public child care, when the state intervenes for the protection or well-being of the child. This is also the case for marital-related issues in which divorce and ancillary relief are private matters whereas abusive and threatening behaviour between spouses is deemed criminal and therefore a public matter. Sharia law does not separate these issues into the private and public and Sharia law has a great deal of canon in all issues relating to the family²⁰.

4. English law and domestic abuse

This is not the forum to dissect and compare all areas of intersection between family and criminal law but there are main examples of English and Sharia approaches to criminal law coming into direct conflict: non-molestation orders and forced marriage.

Non-molestation orders were introduced in 1996 and were designed to act as civil injunctions against abusive partners and ex-partners²¹ often stipulating conditions such as the abusive party having to remain a certain distance away from the victim. Whilst these were civil injunctions, the breaching of them, like any civil court order, could result in criminal prosecution for contempt of court. This could result in anything up to a two year custodial sentence. These orders were made more stringent in 2004 when a breach of a non-molestation order was deemed to be a new criminal offence punishable by 5 years in prison. This new offence allowed victims to decide whether to rely on the civil procedure or to contact the police and have the matter publically prosecuted.

The purpose of these orders is to prevent abusive partners from further abusive behaviour, often at a time of divorce or of child custody proceedings. In the UK domestic violence is prosecuted in

¹⁹ A. Buchler, *op.cit.*, p. 1.

²⁰ *Ibidem.*

²¹ S.42(2) and S.45(1) Family Law Act 1996.

a slightly different way to non-domestic assaults in that prosecutors are aware of victims' tendency to withdraw complaints to the police either because of further threats from their partners or because of psychiatric conditions such as Battered Person Syndrome. Subsequently, prosecutors will continue with prosecutions even where the victim retracts their complaint, relying on evidence of medical reports and expert witnesses who will testify to the effect of long term abuse on the mental state of victims. These proceedings can be on-going at the same time as divorce proceedings and subsequently, this is the clearest example of when private meets public law.

5. Sharia councils and domestic abuse

How do Sharia Councils undermine these orders and the approach of prosecuting domestic abuse? As previously suggested, Sharia law does not make the same distinction between private and public family law as exists in the UK. Muslim (and Jewish) cultures largely define any issue relating to marriage as private²² and subsequently, come to the conclusion that such matters may be open to arbitration rather than any public law involvement.

The first concern raised by the use of private arbitration in the field of domestic violence is that it undermines the role of the state to prosecute offences which we, as a society, find particularly abhorrent. In its simplest terms, the criminal law defines those acts which society believes ought to be punished with the loss of liberty but also, with the public shaming of the defendant. Sharia Councils or a Beth Din cannot achieve this as they do not have the power to forcibly detain offenders and their arbitration, by definition, is private.

²² A. Madera, *Juridical bonds of marriage for Jewish and Islamic women*, "Ecclesiastical Law Journal" 2009, vol. 11, p. 1, <http://dx.doi.org/10.1017/S0956618X0900163X>.

The second concern with using Sharia Councils for domestic violence is that, even if we do forsake the remedy of prison for domestic violence, there is a presumption in arbitration that both parties are consenting to the use of an arbitrator as opposed to seeking a remedy through the English courts²³. Currently there are no safeguards to ensure that parties are freely co-operating with the Sharia Council or a Beth Din. Both Judaism and Islam calls for arbitration in this field either through the mechanism of a *Siruv*, compelling Jewsto submit to the Beth Din²⁴, or through the teaching of the Quran, which relies heavily upon religious arbitration in this field.

There are very strong arguments to suggest that many women who seek relief under the law due to domestic violence are put under pressure, both religious and from their communities, to conform to religious rather than English law²⁵. However, social and emotional pressure is not recognised as legal coercion in English law and subsequently, Sharia Councils could argue that it is perfectly legal to pressurize women into accepting the jurisdiction of Sharia.

In the arbitration process itself, there are many accounts of women being made to accept that they are to blame for deserting their husbands even if they have been “chastised” by them²⁶. This often leads to women feeling as though they are obliged to return to a violent relationship which puts them in danger. This is in direct conflict with the English criminal law in instances when a non-molestation order has been granted. A woman may be granted an injunction against an abusive husband in an English court but the Sharia Council will tell her that she has a duty to sit with her husband and discuss whether they can be reconciled²⁷. This often puts women into direct physical danger²⁸. Moreover, the procedure rules of the MAT give worryingly little regard for the physical safety of women during arbitration and refer only fleetingly about not al-

²³ A. Buchler, op.cit., p. 10.

²⁴ B. Berkovits, op.cit., p. 2.

²⁵ S. Bano, op.cit., p. 5.

²⁶ Ibidem, p. 10.

²⁷ Ibidem, p. 9.

²⁸ Ibidem, p. 10

lowing direct arbitration where a party is behaving in a “violent or disorderly manner”²⁹.

A third concern with the use of Sharia arbitration in the field of domestic abuse is that whilst Islamic law does allow for the dissolution of marriage (which is the remedy women are mostly seeking), this is only acceptable when ill-treatment between spouses makes conjugal life intolerable³⁰. This is a high threshold to meet and individual accounts of experiences with Sharia Councils suggest that some arbitrators appear to take the view that reconciliation is more important than protecting women³¹. Sharia councils consider their first duty to be to try and save marriages rather than to grant relief to women escaping violent husbands through the medium of divorce. Perhaps more significantly, most Sharia scholars are agreed that an element of physical chastisement of women is perfectly acceptable in marriage and only problematic if the woman is seriously hurt³². This is in direct conflict with English criminal law which states that victims cannot even consent to more serious assaults unless there is a reason such as surgery³³. Subsequently, even if Muslims choose to live by a code which sees them beaten by their husbands, the English law does not permit this.

6. Conclusion

A possible safeguard for victims of domestic violence in the face of Sharia as the Beth Din jurisdiction is the requirement of independent legal advice for both parties before acquiescing to Sharia as the Beth Din. Ostensibly this may appear an attractive solution but in the face of family, community and religious pressure it is unlikely that an English lawyer is going to have any impact in convincing some Muslim women that they have an alternative option and do not have to be subject to Sharia.

²⁹ S.5 (1) (3) Procedure Rules for the Muslim Arbitration Tribunal.

³⁰ A. Madera, *op.cit.*, p. 5.

³¹ S. Bano, *op.cit.*, p. 9.

³² J. Brechen, *op.cit.*, p. 8.

³³ *R v Brown* [1994] 1 AC 212.

Legally and practically it is impossible for there to exist an entirely pluralistic system of courts and tribunals in the UK in the realm of family law. This is due to the overlapping issues which stray into the criminal law, the adjudication of which must remain within English law. This does not mean that alternative dispute resolution and parallel tribunals such as the Beth Din and Shar'ia courts cannot exist at all, but if they are to be a viable and fair form of arbitration, there must be a clear delineation between private and public areas of law such as marital breakdown and domestic violence. Moreover, this system must be regulated and enforced by national legal mechanisms and not left to the discretion of local religious leaders.

Before the establishment of the MAT, Sharia Councils were happy to function in a private and unregulated domain and whilst this may be for a number of reasons, the result is that issues of domestic violence were being hidden and not addressed according to English law. With regard to forced marriage, the British government has recognised that this is a further area of family law which has previously been considered in the civil sphere, and thus the private sphere, but which must be criminalised if it is to be publicly enforced.

This paper has not attempted to lay down rules of regulation which may protect women from the hiding and, in some cases, the condoning of domestic violence. Rather, it has sought to highlight the fundamental and perhaps unavoidable blockade in the path of a pluralist tribunal system in the UK.

STRESZCZENIE

Sądy szariackie i rabiniczne w Zjednoczonym Królestwie:
czy pluralizm prawny jest tylko fikcją konieczną
ze względów politycznych?

Około 2008 r. prezentowano postulaty wprowadzenia sądów religijnych jako użytecznego narzędzia wspomagającego angielski system wymiaru sprawiedliwości. Już w 2007 r. powołano Muzułmański Trybunał Arbitrażowy do

rozstrzygania spraw cywilnych. Funkcjonuje on w oparciu o powszechną możliwość odwołania się stron do osoby trzeciej, której rozstrzygnięcie jest uznawane przez sądy. Jednakże podnosi się zarzut, że decydowanie w ten sposób w sprawach przemocy domowej podważa rolę oskarżyciela publicznego w przypadkach uznawanych za szczególnie odrażające. Jednym z postulowanych rozwiązań jest zapewnienie niezależnej pomocy prawnej obu stronom występującym przed sądami szariackimi bądź rabinicznymi.

Słowa kluczowe: sądy szariackie, sądy rabiniczne, przemoc domowa.

SUMMARY

Sharia and Beth Din courts in the UK: is legal pluralism nothing more than a necessary political fiction?

Since 2008, sharia courts were postulated that they may be positive for the English law and for English justice in general, to facilitate for a more pluralist legal system in which people can choose which law they wish to comply with, religious or English one. This idea was recognized as very controversial. Anyway the Muslim Arbitration Tribunal, supposed to operate within a civil jurisdiction, was established already in 2007. MAT is treated as any other alternate dispute resolution tribunal, what means that parties can consent to have their disputes decided by a third party and that these decisions are recognized in an English court. It is very important that abuse has, until fairly recently, often been seen as a matter of private rather than public law within the English system and this delineation between public and private family matters has been maintained by Muslim law to a large extent. The concern raised by the use of private arbitration in the field of domestic violence is that it undermines the role of the state to prosecute offences which a society find particularly abhorrent. A possible safeguard for victims of domestic violence in the face of Sharia or Jewish the Beth Din jurisdiction is the requirement of independent legal advice for both parties before acquiescing to Sharia as the Beth Din.

Keywords: Sharia courts Beth Din courts, domestic violence.

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